22170

NO. 47147

United States
Court of Appeals
for the Ninth Circuit

JAMES CARLTON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the Judgment of the United States District Court for the District of Oregon

BRIEF FOR THE APPELLEE

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GANN PUBLISHING CO., PORTLAND, OREGON 11-13-67

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JURISDICTION

The Government concurs with the JURISDICTIONAL STATEMENT set forth in APPELLANT'S OPENING BRIEF.

COUNTER STATEMENT OF THE CASE

A. THE EVIDENCE.

On the date of the admitted attack, Susan David was 19 years old and married to a Coast Guardsman. She did not know defendant James Carlton (Tr. 21, 23). Defendant stealthily entered the switchboard

room, came silently behind Mrs. David and said: "DON'T SAY ANYTHING" (Tr. 24). Then the defendant hammerlocked Mrs. David around the throat and began choking her. Mrs. David fought to get away; she struggled to rip defendant's arm from against her throat; she reached up to tear at defendant's ear; she grappled to fight him off (Tr. 24, 25). Defendant dragged Mrs. David to an adjoining passageway; he choked her until she couldn't breathe; her tongue began to swell; her body went limp; she was fearful of being raped and killed. Defendant threw Mrs. David to the floor and forced her panties down below her knees (Tr. 25, 27).

After the switchboard rang, defendant loomed behind Mrs. David and barred the only escape route (Tr. 27). No one else was in or near the building where the attack occurred (Tr. 30). Mrs. David submitted to penetration by the defendant in fear of her life (Tr. 32).

B. THE CHARGE.

The issues raised by appellant relate to the trial judge's charge to the jury. In addition to other instructions on the law, the jury was told not to single out one instruction alone as stating the law, but to consider the instructions as a whole (Tr. 68).

The instruction on general intent was given (Tr. 69); and the jury was advised of the power of the

judge to comment on the evidence. The jury was cautioned to disregard any opinion on the facts it might believe the judge held because the jury was the sole and exclusive judges of the facts (Tr. 73, 74).

The trial judge instructed on the essential elements of rape, defined "carnal knowledge" and commented that the fact of penetration had been stipulated to. The distinction between "consent" and "submission" was explained and instructions were given on "force" and "fear".

Then the trial judge gave the instruction on the lesser included offense of assault with intent to commit rape (Tr. 76, 77). The judge defined the elements of the lesser included offense and gave the instruction on specific intent (Tr. 77).

At the close of the charge, defendant excepted to the judge's failure to give defendant's requested instruction on the element of intent to put the prosecutrix in fear of death or grave bodily harm (Tr. 79, 80; R. 4).

The jury retired and thereafter returned with a question on penetration. The trial judge first advised that his supplemental instruction should be considered together with all the other instructions he had given. The judge explained that "penetration" was an established fact. He then gave supplemental instruc-

tions on the elements of rape and on consent, submission, fear, bodily harm and general intent. The court instructed further on the lesser included offense (Tr. 82, 83, 84).

Defendant objected to the supplemental instructions and the trial judge considered and corrected those instructions (Tr. 85, 86).

Thereafter, the court commented on the evidence established by the testimony. Defendant immediately objected to the trial judge's comment, and again objected to the failure of the judge to charge that the defendant must have had a specific intention to put the prosecutrix in fear of death (Tr. 86, 87).

After retiring, the jury returned to the courtroom again. The trial judge inquired as to the number of jurors who believed that after dinner they could or could not arrive at a verdict (Tr. 88, 89).

A colloquy occurred between the court and the jury and, in answer to questioning, the trial judge gave additional instructions on the elements of rape and on the elements of the lesser charge of assault with intent to rape. Defendant moved for a mistrial and objected to the court's supplemental instructions.

Except as further clarified herein, the Government agrees with the balance of the appellant's STATEMENT OF THE CASE.

ANSWER TO SPECIFICATIONS NOS. 1 AND 2

THE TRIAL COURT CORRECTLY REFUSED TO GIVE DEFENDANT'S REQUESTED INSTRUCTION WITH RESPECT TO INTENT, AND ITS SUPPLEMENTAL INSTRUCTIONS WERE NOT ERRONEOUS NOR PREJUDICIAL.

ARGUMENT

Appellant's scattergun attack on the charge of the trial judge commingles objections relating to the charge of rape with those pertaining to the lesser included offense. Appellant was found not guilty on the charge of rape, therefore all objections relating to "rape" are mooted.

A. DEFENDANT'S REQUESTED INSTRUCTION

1. The requested instruction obviously relates to specific intent and was clearly erroneous:

> "If you find that the defendant lacked the (specific) intent to put the prosecutrix in fear of death or grave bodily harm, you must find the defendant not guilty." (R. 4)

Not guilty of what?—Rape or assault with intent to commit rape? The requested instruction does not give a clear reference, however, APPELLANT'S OPENING BRIEF hints that the requested instruction refers only to the crime of rape (Ap. Br. pp. 6, 7).

Rape is not a crime which requires a specific intent.

State v. Smith (1940), 3 Wash. 2d 543, 101 P.2d 298, involved a rape prosecution. On appeal defendant contended that the trial court had erred in refusing to give a requested instruction on specific intent. The trial court, instead, gave the following instruction:

> "While a general criminal intent is involved in the crime of rape, no intent is requisite other than that evidenced by the doing of the acts constituting the offense."

At page 302 of its opinion, the Supreme Court of Washington found no error in the action of the trial court and said:

> "We think whatever criminal intent is necessary to be shown in the crime of rape is shown by the doing of the acts constituting the offense."

In *McGuinn v. United States,* (C.A. D.C., 1950) 191 F.2d 477, 479, the defendant appealed his conviction of rape and sodomy. On appeal it was alleged that the trial court erred in failing to give a requested instruction that rape requires that a specific intent be found to exist. The Court of Appeals denied that contention by simply stating:

> "Rape is not a crime which requires a specific intent."

The idea of specific intent signifies the absence of accident, inadvertence or casualty. It is the contrary

of an innocent state of mind. In *Wigmore's Third Edition,* Vol. II, Sec. 356, at Page 266, it is stated:

> "Where the charge is rape, the doing of the act being disputed, it is perhaps still theoretically possible that the intent should be in issue; but, practically, if the act is proved there can be no real question as to intent."

2. If we assume defendant's requested instruction was intended to relate to the lesser included offense, that instruction did not state the law. The essential elements of assault with intent to commit rape are (1) an assault, (2) an intent to have carnal knowledge of the female, and (3) a purpose to carry into effect this intent with force and against the consent of the female. *Baber v. United States,* (C.A. D.C., 1963) 324 F.2d 390, 392. The lesser included offense does not require a showing of specific intent, on the part of the defendant, to put the woman in fear of death or grave bodily harm.

The question of fear on the part of the woman relates to whether or not there was consent to a penetration, and is applicable only to the higher offense of rape; and rape does not require any specific intent. The requested instruction was not only an erroneous statement of the law but also illogical. The woman's fear is contingent upon the conduct of the man. If the man's conduct is not such as to place the woman

in reasonable apprehension of harm, his intent to put her in fear is totally irrelevant.

Neither *Baber v. United States, supra,* nor *People v. Jenkins,* (1930) 342 I11. 238, 174 N.E. 30, stand for the proposition suggested by defendant's requested instruction. Both of those cases involved assaults with intent to commit rape. In both cases the facts showed disgraceful conduct and an indecent assault, but the evidence failed to show intent to have sexual intercourse by force and against the resistance of the woman. The issue of fear did not arise in these cases.

The trial judge was under no obligation to give a requested instruction which was clearly erroneous. *Lash v. United States,* (C.A. 1, 1955) 221 F.2d 241.

B. GRAVE BODILY HARM—REAL AND UNFANCIFUL FEAR

The trial judge prefaced his supplemental instructions with the following charge (Tr. 82):

> "Whatever I say should be considered together with all the other instructions that I have given you."

Defendant objected to the judge's alleged failure to use the phrases "grave bodily harm" and "fear must be real and not fanciful". Words of identical import were included in the trial court's instructions:

> "*** By constructive force I mean where a woman yields through fear caused by threats of grave bodily harm, rather than because of actual physical force.
>
> * * *
>
> "The fear, to be sufficient for this purpose, must be based upon something of substance; and furthermore, the fear must be of death or severe bodily harm.
>
> "She must have a reasonable apprehension of something real; her fear must be not fanciful but substantial." (Tr. 75, 76)

and,

> "My attention has been called to the fact that when I gave you those instructions, I failed to tell you that she must have had a reasonable apprehension of some grave bodily danger or death, and that the fear must have not been fanciful but substantial." (Tr. 85)

Whether a jury is properly instructed cannot be determined from a consideration of a single paragraph, sentence or phrase, but the instructions must be considered as a whole. *Beck v. United States,* (C.A. 9, 1962) 298 F.2d 622, 634.

C. GENERAL INTENT

Appellant objected to the alleged failure of the trial judge to instruct on the general requisite of criminal intent (Tr. 85). The judge had previously done so:

> "To constitute a crime there must be the joint operation of two essential elements, an act forbidden by law and an intent to do the act.
>
> "Before a Defendant may be found guilty of a crime the prosecution must establish beyond doubt that under the statute defined in these instructions, the accused was forbidden to do the act charged in the indictment, and that he intentionally committed the act.
>
> "In this connection, you may infer that every person intends the natural consequences of his voluntary acts." (TR. 69)

The judge went further than requested after considering defendant's objection:

> "In connection with this matter of intent, an act must be done with specific intent to do something which the law forbids. That is to say, with bad purpose either to disobey or disregard the law." (TR. 85, 86)

D. SPECIFIC INTENT

For the very first time appellant claims, on appeal, that:

> "The instruction with respect to assault with intent to commit rape (Tr. 84) omitted entirely any reference to intent, which is a specific requirement of that crime. 18 U.S.C. 113(a)." (Ap. Br., p. 11)

The trial judge properly charged the jury as to specific intent with reference to the lesser included crime:

"Any willful attempt or threat to inflict injury upon the person of another, when coupled with an apparent present ability to so do, and an intentional display of force such as would give the victim reason to fear or expect immediate bodily harm, constitutes an assault. An assault may be committed without actually touching or striking or doing bodily harm, to the person of another.

"The word to 'attempt' an offense means willfully to do some act, in an effort to bring about or accomplish something the law forbids to be done.

"An act is done willfully if done voluntarily and intentionally, and with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or to disregard the law." (Tr. 77)

Also, see the above quoted corrective instruction (Tr. 85, 86), and the judge's last instruction to the jury (Tr. 90):

"If on the other hand, the Defendant put his arms around her throat, and told her not to say anything with the intent thereof to committing rape, then he let her go and subsequently she acquiesced when there was no reasonable grounds on her part to believe that she was in danger of being killed or of grave bodily harm, even though she may have believed that, then he would not be guilty of rape, but he would be guilty of the lesser charge of assault with intent to rape." (Emphasis supplied.)

The failure to interpose timely and specific objections to possible error or omission in the instructions

results in waiver of the objection on appeal. *Rule* 30, *F.R.C.P.*

E. OTHER LESSER INCLUDED OFFENSES

Also for the first time on appeal, appellant alleges that he was entitled to have the jury instructed on some degree of assault lesser than assault with intent to commit rape.

In *Younger v. United States,* (C.A.D.C., 1959) 263 F.2d 735, the appellant complained that the trial court failed to give an instruction to the effect that the jury could find him guilty of the lesser included offense of simple assault. At page 737 of the opinion the court stated:

> "*** The short answer to this is that request for such an instruction was not made. *** appellant cannot be heard to complain that such an instruction was not given."

Also, see *State v. Jones,* (1958) 249 N.C. 134, 105 S.E.2d 513, 516.

ANSWER TO SPECIFICATION NO. 3

THE COMMENT OF THE TRIAL JUDGE WAS NOT PREJUDICIAL.

ARGUMENT

The jury was properly instructed on the trial judge's power to comment on the evidence and the credibility of witnesses (Tr. 73). The jury was directed to dis-

regard any attitude or opinion that they might think the trial judge held (Tr. 73).

The statements objected to were prefaced by judicial acknowledgment that such statements were "a matter of comment" (Tr. 86). The evidence commented upon was not in dispute; the trial judge did not add to the evidence; he was not argumentative in his comments; he did not urge his own view of the guilt or innocence of the accused; nor did he assume the role of an advocate.

The trial judge made the comment in question as a supplemental instruction to the jury's inquiry as to whether or not there had been penetration at the time the switchboard rang. The trial judge instructed on this point favorably to appellant and obtained a concession from the Government (Tr. 84).

Appellant's objections, in addition to intent, related to the degree of fear that prosecutrix must have suffered in order to show submission rather than consent (Tr. 85). It is evident that the trial judge's comment on the fact of prosecutrix's bowell movement during penetration was pertinently related to the question of fear, penetration and consent (Tr. 41, 42).

Appellant quotes *Billeci v. United States,* (C.A.D.C., 1950) 184 F.2d 394, for the general rule governing federal trial court judges in commenting upon the evi-

dence. The gravemen of the trial court's conduct in *Billeci* was that the judge erroneously gave the "willful and flagrant" *Horning* charge (254 U.S. 135) in a case where the facts were disputed. Language of the court in the *Billeci* case, which appellant omits, supports the trial judge's comment in the instant appeal (Ap. Br. pp. 13, 14). At pages 402-403 of its opinion, the District of Columbia Court of Appeals also stated:

> "A federal trial judge in a criminal case *** may guide and assist the jury in its consideration of the evidence. The purpose of his comment is to aid through his experience, the inexperienced laymen in the box in finding the truth in the confusing conflicts of contradictory evidence. In exceptional cases he may even express his opinion upon the evidence, or phases of it. ***"

As in *Billeci, supra, Blunt v. United States* (C.A. D.C. 1957), 244 F.2d 355, turned on facts totally alien to the facts in the instant case. In a prosecution for robbery, the trial judge added to the evidence and based his instructions upon his own addition; he made improper comments regarding the release of a dangerous man to prey upon society; and through an erroneous instruction, he took from the jury an issue which should have been considered.

Appellant also quotes from *Quercia v. United States* (1933), 298 U.S. 466. The trial judge in *Quercia* added to the evidence a concrete assertion of fact based

entirely upon his own experience, and then he based his instruction upon his own addition. Again the appellant omits a pertinent paragraph of the court's pronouncement:

> "In charging the jury, the trial judge is not limited to instructions of an abstract sort. It is within his province, whenever he thinks it necessary, to assist the jury in arriving at a just conclusion by explaining and commenting upon the evidence, by drawing their attention to the parts of it he thinks important; and he may express his opinion upon the facts, provided he makes it clear to the jury that all matters of fact are submitted to their determination."

In the instant case the trial judge's instructions were clear, definite and understandable, and his comments coincided with the facts developed by the testimony.

ANSWER TO SPECIFICATION NO. 4

THE TRIAL JUDGE DID NOT INQUIRE OF THE JURY AS TO THE NATURE OR EXTENT OF ITS NUMERICAL DIVISION OR THE PROPORTION OF DIVISION OF OPINION.

ARGUMENT

The trial judge asked how many jurors believed that with additional time a verdict could or could not be reached (Tr. 89). The numerical standing of the jury could not have been disclosed by any response to this inquiry. Of the jurors who believed additional time would produce a verdict, any one or more of them could have been standing either for or against convic-

tion. The same logic applies to the two jurors who at that moment believed that no amount of time would produce a verdict. The critical existence of a minority was not revealed and the possibility of coercion was non-existent.

The trial judge's inquiry was not accompanied by an admonishment on the duty of the jury to reach agreement. The information elicited was useful to the judge in deciding whether arrangements should be made for dinner for the jurors (Tr. 88).

For the reasons given above, *Cook v. United States* (C.A. 5, 1958), 254 F.2d 871, has no application in the instant appeal. In addition, the trial judge in *Cook* actually inquired as to the numerical standing of the jury and threatened to hold the jury together through Thursday, Friday, Saturday and Sunday, thus exerting an improper influence or coercion upon the minority determined by his inquiry.

Brasfield v. United States (1926), 272 U.S. 448, 47 S.Ct. 135, 71 L.Ed. 345, involved a trial judge who inquired how the jury was numerically divided. The foreman answered that the jury stood nine to three. *Brasfield* is not precedent for the instant appeal because here there is no evidence of a threat to a dissenting minority, nor coercion, nor undue influence. The trial judge's inquiry in no way affected substantial rights of the defendant.

ANSWER TO SPECIFICATION NO. 5

THE TRIAL JUDGE'S STATEMENT REGARDING SPECIFIC INTENT TO COMMIT RAPE, IN THE CONTEXT GIVEN, WAS NEITHER ERRONEOUS NOR PREJUDICIAL.

ARGUMENT

The colloquy between juror Ragnone and the trial judge clearly reveals that the question troubling Ragnone was whether defendant had to have a specific intent to commit rape (Tr. 89, 90). On that precise point, the trial judge's instruction followed precedent.

In *Askew v. State* (1960), 118 So.2d 219, a prosecution for rape, appellant claimed because of intoxication he was unable to form the requisite specific intent to commit rape. At page 22 of its opinion, the court stated:

> "We do not agree that such a specific intent is the essence of the crime of rape.
>
> "Although very little has been written in this state on the subject of intent in rape prosecutions, it is clear that while a general intent* is requisite other than is evidenced by the doing of the acts constituting the offense.
>
> "The law makes the act of rape the crime and infers a criminal intent from the act itself." (Also, see *State v. Hairston* (1943), 222 N.C. 455, 23 S.E.2d 885; *McQuinn v. U.S., supra.*)

The answer given juror Ragnone applied only to the charge of rape (Tr. 90). The trial judge thereafter

* Omitted language: "is involved in the crime, no specific intent"

distinguished the two different subjects and gave an explanatory charge on assault with intent to commit rape (Tr. 90):

> *"If on the other hand, the Defendant put his arms around her throat, and told her not to say anything with the intent thereof to committing rape, then he let her go and subsequently she acquiesced when there was no reasonable grounds on her part to believe that she was in danger of being killed or of grave bodily harm, even though she may have believed this, but if there was no reasonable grounds to believe that, then he would not be guilty of rape, but he would be guilty of the lesser charge of assault with intent to rape."* (Emphasis supplied.)

These statements, omitted from Appellant's Opening Brief, were the court's last words and served to assist the jury toward an intelligent understanding of the legal and factual issues involved.

The court's duty under these circumstances is stated in *Bollenbach v. United States* (1946), 326 U.S. 607 612:

> "The jury's questions *** clearly indicated that the jurors were confused *** Discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depended on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria. ***"

Juror Ragnone made explicit his difficulties and the trial judge properly cleared them away with concrete accuracy.

CONCLUSION

The facts in this case are not in dispute; and the evidence of defendant's guilt was overwhelming. Examination of the record clearly reveals that no error was committed by the trial judge, and neither was defendant deprived of any substantial right guaranteed by the Constitution. Therefore, it is respectfully requested that defendant's conviction be sustained.

Respectfully submitted,

SIDNEY I. LEZAK
United States Attorney
District of Oregon

MALLORY C. WALKER
Assistant United States Attorney

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated this 13th day of November, 1967.

MALLORY C. WALKER
Assistant United States Attorney